

BEFORE THE

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WASHINGTON, D. C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Rules For the Filing of International)
Circuit Status Reports)

CC Docket No. 93-157

TO: The Commission

COMMENTS OF IDB COMMUNICATIONS GROUP, INC.

IDB Communications Group, Inc. ("IDB"), by its attorneys, files these comments in response to the Notice of Proposed Rulemaking (FCC 93-291) released in the above-captioned proceeding on July 2, 1993 [hereinafter "Notice"]. The Notice proposes to codify requirements for the filing of international circuit status reports by U.S. facilities-based common carriers. IDB supports the proposal that circuit status reports be filed annually. However, IDB is concerned by the proposed definition of "facilities-based common carrier."

The Notice states (at ¶ 2 n.2) that "[f]or purposes of this proceeding, we shall define facilities-based common carriers as those international common carriers which acquire international transmission facilities on an ownership or indefeasible right of use [IRU] basis or lease satellite capacity from Comsat or a separate satellite system." The Notice offers no justification or explanation of this proposed definition, nor does it examine whether the definition is consistent with the Commission's past practice.

The definition in the Notice creates arbitrary distinctions between facilities-based and non-facilities based

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carriers. Under the proposed definition, a common carrier which leases facilities from Comsat or a separate satellite system is a facilities-based carrier, while a common carrier which leases facilities from a cable system is not. Another arbitrary distinction is that a common carrier which obtains an IRU in a cable is a facilities-based carrier, while a carrier which leases long-term bulk capacity in the same cable is not. A third arbitrary distinction is that common carriers which obtain capacity from Comsat are defined as facilities-based carriers, while non-common carrier satellite earth station providers which obtain capacity from Comsat, such as Brightstar Communications, Ltd., are not defined as facilities-based carriers. IDB is not aware of any statutory, policy or administrative reasons for making these distinctions.¹

Moreover, the definition of "facilities-based common carrier" in the Notice is inconsistent with previous definitions used by the Commission. In its recent reconsideration decision in CC Docket No. 90-337, the Commission noted that "facilities-based carriers" include common carriers which obtain capacity from Comsat, a separate satellite system, or a non-common carrier cable system for use in providing common carrier services to third

¹ The definition in the Notice is not consistent with the theory, to which some subscribe, that the "first taker" of capacity from the owner of the facility should be regarded as a facilities-based carrier. Under the first-taker theory, a carrier which leases long-term bulk capacity from the owner of a cable facility would qualify as a facilities-based carrier, while the definition proposed in this docket would exclude such a carrier from being a facilities-based carrier.

parties.² The Commission made no distinctions based upon the manner in which the carrier obtained capacity (i.e., IRU versus lease). Indeed, the Commission described the issue as whether its international private line resale policy applies to "the sale or lease of facilities" on a non-common carrier basis from satellite or cable system operators.³ Based upon that statement, the Commission apparently contemplated that carriers which lease capacity on satellite or cable systems qualify as facilities-based carriers.

The definition proposed in the Notice also conflicts with the Commission's manual for filing traffic and revenue data under 47 C.F.R. § 43.61. The manual provides that "[f]acilities-based carriers own or lease international telecommunications facilities in order to provide international service."⁴ The manual reiterates that "[a] facilities-based carrier may own or lease international channels."⁵ Unlike the definition proposed in the Notice, the manual regards carriers which lease transmission capacity in order to provide common carrier service to third parties as facilities-based carriers.

Until quite recently, the Commission's consistent past practice was to classify carriers which lease the underlying

² Regulation of International Accounting Rates, 7 FCC Rcd 7927, 7931 (1992).

³ Id.

⁴ See Manual for Filing Section 43.61 Data, FCC Report 43.61 (July 1992) at 4 (emphasis supplied).

⁵ Id. at 12 (emphasis supplied).

transmission capacity as facilities-based carriers. The Commission adopted 47 C.F.R. § 63.10(b) to require non-dominant carriers to file semi-annual circuit addition reports, and the Commission made quite clear that this provision applied solely to facilities-based carriers.⁶ The Commission then imposed this reporting requirement upon carriers which leased the underlying transmission capacity, thereby demonstrating that such carriers were, in the Commission's view, facilities-based carriers.⁷ In a few recent instances the Commission has classified carriers which lease the underlying transmission facilities as resale carriers, but nevertheless subjected such carriers to Section 63.10(b) even though that provision was designed only for facilities-based carriers.⁸ However, the Commission neither acknowledged or explained its departure from past practice.

It is incumbent upon the Commission to address squarely the issue of which carriers should be classified as "facilities-based common carriers." This issue is critical because certain

⁶ E.g., "Requirement that Non-Dominant International Carriers File Semi-Annual Circuit Addition Reports (Section 63.10(b)), Report No. I-6421, 1990 Lexis 440 (Jan. 31, 1990); Adams Telegraph Company, 4 FCC Rcd 1646, 1647 n.6 (1989).

⁷ E.g., Westinghouse Communications Services, Inc., 6 FCC Rcd 1771 (1991) (Section 63.10(b) applies to carrier which leased from MCI twenty-four 56 KBPS circuits -- or one T-1 circuit -- in the TCS-1 cable); NetExpress Communications, Inc., 7 FCC Rcd 51 (1992) (Section 63.10(b) applies to carrier's lease of two 56-64 KBPS circuits between the U.S. and Japan); IT&E Overseas, Inc., 4 FCC Rcd 8345 (1989) (Section 63.10(b) applies to carrier's lease of 30 MAUOs in the TPC3/HAW-4 cables).

⁸ See LDDS Communications, Inc., 8 FCC Rcd 924 (1993); Fonorola Corporation, 7 FCC Rcd 7312 (1992).

Commission requirements and policies, such as the international private line resale policy, hinge upon whether a carrier is classified as a facilities-based carrier or a resale carrier. Such an important part of the Commission's regulatory scheme should not be left to incremental, ad hoc and unexplained variations. Rather, the Commission should give interested parties a meaningful opportunity to comment on this issue and then adopt a uniform and non-discriminatory definition which promotes the public interest.

As IDB has previously advised the Commission, all carriers who lease bulk transmission capacity to provide common carrier services to third parties should be classified as facilities-based carriers, particularly when a lease is the maximum interest in the transmission facility permitted by law.⁹ There are no legal, policy or administrative reasons to distinguish between satellite and cable facilities, IRU and leasehold interests, or non-common carrier and common carrier facilities. At a minimum, if the Commission desires to use an ad hoc definition of the term solely for purposes of this rulemaking proceeding, the Commission should make clear that this definition

⁹ See Letter from R. Koppel, IDB, to K. Kneff, FCC (March 24, 1993) (IC-93-02151).

has no precedential significance for any other Commission policies and requirements.

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